



- II.E.1.a. The excess emissions were caused by a sudden, unavoidable breakdown of equipment, or a sudden, unavoidable failure of a process to operate in the normal or usual manner, beyond the reasonable control of the owner or operator;
- II.E.1.b. The excess emissions did not stem from any activity or event that could have reasonably been foreseen and avoided, or planned for, and could not have been avoided by better operation and maintenance practices;
- II.E.1.c. Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded.
- II.E.1.d. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;
- II.E.1.e. All Reasonably possible steps were taken to minimize the impact of the excess emissions on ambient air quality;
- II.E.1.f. All emissions monitoring systems were kept in operation (if at all possible);
- II.E.1.g. The owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs or other relevant evidence;
- II.E.1.h. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- II.E.1.i. At all times, the facility was operated in a manner consistent with good practices for minimizing emissions. This Section II.E.1.i. is intended solely to be a factor in determining whether an affirmative defense is available to an owner or operator, and ~~shall does~~ not constitute an additional applicable requirement; and
- II.E.1.j. During the period of excess emissions, there were no exceedances of the relevant ambient air quality standards established in the Commissions' Regulations- that could be attributed to the emitting source.

## II.E.2. Notification

The owner or operator of the facility experiencing excess emissions during a malfunction ~~shall must~~ notify the Division verbally as soon as possible, but no later than noon of the Division's next working day, and ~~shall must~~ submit written -notification following the initial occurrence of the excess emissions by the end of the source's next reporting period. The notification ~~shall must~~ address the criteria set forth in Section II.E.1., above.

II.E.3. The Affirmative Defense Provision contained in this Section II.E. ~~shall not be~~ is not available to claims for injunctive relief.

II.E.4. The Affirmative Defense Provision contained in this Section II.E. is not available in federal court proceedings unless the court, in its discretion, decides to recognize and adopt such affirmative defense or decides to take into consideration some or all of the factors described in Sections II.E.1 and II.E.2. in issuing civil penalty determinations.

II.E.45. The Affirmative Defense Provision does not apply to failures to meet federally promulgated performance standards or emission limits, including, but not limited to, new source performance standards -and national emission standards for hazardous air pollutants. The affirmative defense provision does not apply to state implementation plan (sip) limits or permit limits that have been

set taking into account potential emissions during malfunctions, including, but not necessarily limited to, certain limits with 30-day or longer averaging times, limits that indicate they apply during malfunctions, and limits that indicate they apply at all times or without exception.

II.E.6 Nothing in this Section II.E. precludes the use of alternative emission limitations expressed as work-practice based limits or standards set forth in a permit that serve as a continuous limitation during periods of malfunction. This Section II.E.6. will not be construed to allow any SIP emission limitation to be altered through a permit.

## II.F. Circumvention Clause

A person shall not build, erect, install, or use any article, machine, equipment, condition, or any contrivance, the use of which, without resulting in a reduction in the total release of air pollutants to the atmosphere, reduces or conceals an emission that would otherwise constitute a violation of this regulation. No person shall circumvent this regulation by using more openings than is considered normal practice by the industry or activity in question.

[illegible]

## II.J. Affirmative Defense Provision for Excess Emissions During Startup and Shutdown

Some provisions in this Section II.E. have been approved by the U.S. Environmental Protection Agency (“EPA”) for incorporation into Colorado’s State Implementation Plan (“SIP”). Some provisions are currently under review by the EPA. The following guide to the font styles used in this Section II.E. can be used to identify those provisions that have been adopted by the Air Quality Control Commission and are currently under review by the EPA.

Double underlined text will become effective when the EPA approves the language for incorporation into Colorado's SIP.

~~Double-strike-through~~ text will be effective until the EPA approves the underlined text for incorporation into Colorado's SIP.

II.J.1. An affirmative defense is provided to owners and operators for civil penalty actions for excess emissions during periods of startup and shutdown. To establish the affirmative defense and to be relieved of a civil penalty in any action to enforce an applicable requirement, the owner or operator of the facility must meet the notification requirements of paragraph 2 in a timely manner and prove by a preponderance of the evidence that:

II.J.1.a. The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through careful planning and design;

II.J.1.b. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation or maintenance;

II.J.1.c. If the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

II.J.1.d. The frequency and duration of operation in startup and shutdown periods were minimized to the maximum extent practicable;

II.J.1.e. All possible steps were taken to minimize the impact of excess emissions on ambient air quality;

